SUPREME COURT OF NOVA SCOTIA
Citation: *Murphy v. Burke*, 2014 NSSC 359

Date: 20141003
Docket: Hfx No. 427319
Registry: Halifax

Between:

Michael Murphy

Plaintiff

v.

Clayton Burke

Defendant

and

Docket: Hfx No. 428773

Between:

Karen Crouse

Plaintiff

v.

Jacob Sparks

Defendant

and

Docket: Hfx No. 429097

Between:

Matthew Oldford

Plaintiff

v.

Kevin Rector

Defendant

DECISION

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	Referred on September 3, 2014
Final Written Submissions:	September 12, 2014
Counsel:	Annette E. Anselm, Prothonotary Leah N. Grimmer, for Michael Murphy Michelle L. Chai, for Karen Crouse Jeffrey D. Waugh, for Matthew Oldford

Moir J.:

[1] Acting under Rule 30.01(3), the Prothonotary Annette E. Anselm requested my opinion about whether motions for default judgment in each of the captioned actions meet the requirement of Rule 8.06(b), so that an assessment of damages is unnecessary.

[2] Each action values a subrogated claim brought in the name of the plaintiff by the plaintiff's insurer, following payment by the insurer to its insured for damages sustained in a collision. Each pleads facts establishing the defendant's negligence as cause of the damages. Each pleads the insured's subrogation rights under the *Insurance Act*.

[3] In *Murphy v. Burke*, the statement of claim says that the insurer "has paid the claim of its insured" and seeks judgment against the defendant for "Special damages in the amount of $5,170.53 representing the property damages caused to the Plaintiffs' motor vehicle together with towing costs and the costs of a rental vehicle". In *Crouse v. Sparks*, the insurer "paid the claim of its insured" and seeks judgment for "special damages in the amount of 19,649 Dollars and 85 Cents". No details or particulars of the special damages are given. In *Oldford v. Rector*, the

insurer "paid the claim of its insured" and seeks judgment for "special damages in the amount of $4,811.93". Again, no details are given.

[4] Rule 8.06 reads:

> A prothonotary must refer the assessment of the amount of a default judgment to a judge, unless the judgment is sought in an action brought by notice of action for debt, or the pleadings of the party who makes a motion for default judgment provide both of the following:
>
> (a) a claim in the same amount as in the default judgment or a claim for an amount to be calculated in accordance with a formula that leads to the same amount as in the proposed default judgment;
>
> (b) pleaded facts that, taken as admitted, clearly show that the amount is due, such as a liquidated demand pleaded in sufficient detail.

These actions were not started by notice of action for debt. As the prothonotary points out, the pleadings meet the threshold in Rule 8.06(a), but "it is less clear that the requirement of 8.06(b) has been met."

[5] The current Rules broadened the criteria for default judgment without an assessment of damages by a judge. Rule 51.05(1)(d) of the 1972 Rules authorized a prothonotary to grant an order on default of defence. The amount could be entered "where a claim is for a liquidated demand only": Rule 12.01(2)(a). The default judgment had to be "for damages to be assessed" in cases of "a claim for unliquidated damages": Rule 12.01(2)(b). (Rule 12.02 dealt with mixed claims.)

[6] Judge O'Hearn considered the Rule 12.01 meanings of "liquidated" and "unliquidated" in *Bennett v. Savory* (1976), 22 N.S.R. (2d) 333 (Co. Ct.). The authorities referred to at para. 6 make it clear that a debt or a contract for a fixed sum is a liquidated demand. The concept extends to contracts in which the price or remuneration is not fixed, but is determinable by current prices in a trade or a recognized scale of charges. Damages ascertained by opinion are unliquidated. Merely stating a fixed sum in the writ does not assist.

[7] The plaintiff in *Bennett v. Savory* pleaded that the defendant converted her automobile and that it was worth $800. Judge O'Hearn decided that the claim for judgment for $800 was an unliquidated demand. Damages had to be assessed.

[8] The Court of Appeal referred to several definitions of "liquidated demand" in *Pick O'Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.* (1995), 146 N.S.R. (2d) 203 (C.A.) including, at para. 38, this one taken from the 1988 Supreme Court Practice:

> A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand," but constitutes "damages".

[9] The various plaintiffs refer to definitions of "liquidated demand" in *Pick O'Sea* and submit that because the insurer paid a specific sum to the plaintiff the subrogated claim is liquidated. I respectfully disagree. The pleadings do not show what is owing between the plaintiff and the defendant, only what the plaintiff's insurer was prepared to offer and the insured was prepared to accept. The value of the claim against the defendant may be limited to the subrogated amount, but the pleadings do not clearly show that that is the amount due *by the defendant*.

[10] Under the 2008 Rules, a liquidated demand is merely an example of the kind of claim that can be quantified on default without resort to an assessment. The principle is in the broader words, "pleaded facts that, taken as admitted, clearly show that the amount is due".

[11] The pleading for a judgment in a specific amount in each of the three cases ($5,170.53, $19,649.85, and $4,811.93) does not, of itself, clearly show that the amount is due. Rule 8.06(b) requires that the quantification be demonstrated. Nothing has changed in that regard since the 1972 Rules. Merely pleading a specific amount does not assist.

[12] What unliquidated claims are covered by the new words? I think that the value of the converted automobile in *Bennett v. Savory* would qualify today. On

the other hand, compensation for pain, suffering, and loss of amenities is highly circumstantial, as is loss of profits on injury to a business, and damage to reputation. These are claims the qualification of which requires inquiry into varied circumstances. The value of these claims is too uncertain for any pleadings to "clearly show that the amount is due".

[13] However, there are some unliquidated claims that can be pleaded in such a way as to "clearly show that the amount is due". Loss of past wages over a defined period, cost of care over a defined period, out-of-pocket expenses, definite losses for breach of contract, and cost of repairs are a few that come to mind.

[14] The prothonotary should ask herself: Do these pleadings so clearly provide all the information on the quantification of the claim that I can see the amount claimed is due by the defendant to the plaintiff, or is it necessary to inquire further into the circumstances?

[15] It would have been clearer in *Murphy v. Burke* if the pleadings had broken down the sums for repair, towing, and rent, but the total is pleaded and is to be taken as admitted. We have no idea from the pleadings in *Crouse v. Sparks* and *Oldford v. Rector* how the claimed amounts are quantified or whether they contain uncertain amounts, such as compensation for personal injury.

[16] In my opinion, the pleadings in *Murphy v. Burke* meet Rule 8.06(b), but the pleadings in the other two actions do not.

Moir J.